A MODEST PROPOSAL TO AMEND OHIO'S POST-CONVICTION COMMITMENT LAW

MICHAEL E. GELTNER*

For over thirty years, Ohio has had a very extensive legal structure for post-conviction commitment of what has been called, for lack of a more precise word, the Mentally Deficient Offender.[1] The Ohio Act, passed by the General Assembly in 1939, was sponsored by state Senator Leo M. Ascherman, and was partially based on a study conducted by a committee of the Cuyahoga County Bar Association.[2] Although it has undergone several amendments, it is popularly known as the Ascherman Act and will be referred to by that name here. The Act, as it is presently formulated, can be found in Sections 2947.24 through 2947.29 of the Ohio Revised Code, and is appended in that form as Appendix A to this article.

Although the Ascherman Act has often been referred to as a "Sexual Psychopath" law,[3] cursory examination of the sections as they presently stand indicates that it is not limited, in the offenses covered, to sex offenders, but rather, potentially covers all convicted offenders. Neither is the Act limited to "psychopaths," but rather encompasses "psychopathic" offenders, "mentally retarded" offenders and "mentally ill" offenders. The breadth of coverage can readily be understood by reading the definition of "psychopathic offender" contained in § 2947.24(B) of the Code.[4] Since almost anybody who offends, and especially who recidivates, can at least arguably be tucked under the "psychopath" rubric as it is defined there, "Deviant Persons" seems about the best way to describe the targets of the Ascherman Act.

This article contains a proposal for substantial amendment of the Ascherman Act in order to bring the statute into line with recent constitutional decisions of the United States Supreme Court and other federal courts and to create a structure for the act to function more effectively. In evaluating the proposal or any of its parts, the reader should understand that it is premised on certain variables, such as the state of medical science,

* Professor of Law, Ohio State University.

[1] Language seems to be loaded with many connotations in this area. The Maryland definition, "Defective Delinquents," seems even worse. *See* MD. ANN. CODE art. 31B (1971).

[2] Much of the unpublished legislative history of the law is summarized in Simonsen, Piperno and Allen, A Social-Legal History of Sexual Psychopath Laws and the Development of The Ohio Statutes (presently unpublished), prepared by The Ohio State University Program for the Study of Crime and Delinquency (1973).

[3] *Id.*

[4] Different labels have enjoyed popularity in the psychiatric profession from psychopath to sociopath to anti-social personality and back to sociopath, which seems to be in vogue at present. Likewise, definitions have fluctuated although it now appears that Cleckley's definition, which is different from that contained in § 2947.24, is accepted by the psychiatric profession. See CLECKLEY, THE MASK OF SANITY (4th ed. 1964).

the present capacity of the facilities and staff in existence in Ohio, and the ways in which bureaucracies function. To the extent that these variables change, the premises leading to specific proposals may change and alter the viability of the proposals.

This proposal addresses itself primarily to the tension created in the Ascherman Act by a rather ineffective effort to merge the criminal sentencing process with the mental health commitment process. It is my view that the merging of the two systems has resulted in persons subjected to conviction and/or commitment under the Ascherman Act getting the benefits of neither system but the detriments of both.

Specifically, the sentencing process is characterized by very little in the way of procedural rights (at least after conviction), but some very specific substantive rights as to time of release. Thus, one sentenced for a crime has an absolute right to release when the maximum period of the sentence has been served and a right to periodic review by an independent agency, the parole board, which has the power to order release.

Similarly, one committed to the custody of a mental hospital by the probate court has some very clear rights. Here the rights are procedural rather than substantive, *i.e.*, the individual has a right to a finding complying with due process on the facts necessary for the commitment, but he does not have a substantive right to release, or review for release, at any time specified by law.

From the individual's point of view, the commitment process gives procedural rights and the sentencing process gives substantive release date rights. The Ascherman Act, by merging the two, gives neither to any great degree. There is little attention paid in the act to a procedurally correct determination of the facts leading to the commitment. For example, there is no requirement that the examining physician appear in the court unless subpoenaed;[5] and, theoretically, the commitment as to any individual is indeterminate, a condition resulting in no right to release.[6] This proposal has as its objective divorcing the commitment from the sentencing process and, thus, giving the individual the benefits of one of the two systems.

The proposed divorcing of the mental health and sentencing systems will be achieved by limiting the power of the sentencing court—the municipal courts and the courts of common pleas—to the imposition of the

[5] *See* OHIO REV. CODE ANN. § 2947.25 (Page Supp. 1972) which provides that the report of the person or body who examined the offender is itself *prima facie* evidence of its conclusions even without the direct testimony of the examining physician or psychologist. At least one court has held that a similar provision is a violation of the sixth amendment right to confront one's accusers because, unless the examining physician or psychologist is subpoenaed by defense counsel, the conclusions will not be subject to cross-examination. *See* United States *ex rel.* Gerchman v. Maroney, 355 F.2d 302 (3d Cir. 1966).

[6] This is true even if the individual committed to a mental health facility is receiving no benefit from the medical treatment available there. *See* State v. Braggs, 221 N.E.2d 493 (Juv. Ct. 1966). In fact, under the terms of the act, the indeterminate commitment can be "served" in a prison, OHIO REV. CODE ANN. § 2947.25(B) (Page Supp. 1972).

sentence for the crime and limiting to the probate court the power to impose an indeterminate commitment. In addition to eliminating the commitment power of the sentencing court, this proposal is designed to create mechanisms for dealing with the very specific problems of the nature of treatment, the right to treatment, the right to refuse treatment, etc., which are a necessary part of the commitment process, and, to the extent that therapy or "rehabilitation" is attempted in the penal system, a necessary part of the penal process.

No guarantees are made about the constitutionality of the Ohio system if the changes proposed are enacted into law. In fact, judicial decision-making in this area is sufficiently unsettled to make very risky any predictions as to what the courts will decide are the limits of the commitment powers and process.[7] Moreover, whatever constitutional standards are developed will be tested not only by the state's written law but also by reference to how it is administered in practice,[8] so that a law apparently fair on its face, which is administered in a discriminatory manner[9] or in a cruel and unusual manner,[10] will not withstand attack on the latter grounds. This proposal appears on its face to be consistent with what is required by recent decisions and should provide a framework for minimizing deprivations of constitutional rights and reconciling the need for

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[7] I have purposely avoided analyzing the case law here, except as it bears directly on a specific problem, on the ground that doing so is a magnus opus which would overwhelm the limited objectives of this article. The most significant decisions bearing on the issues considered here include: Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972), reversing, in part, Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971) and Murel v. Baltimore City Court, 407 U.S. 355 (1972), dismissing cert. as improvidently granted respecting the remainder of Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971) as well as the Tippett opinion and especially the opinion of Judge Sobeloff at 436 F.2d 1159-66 (D.C. Cir. 1968); Powell v. Texas, 392 U.S. 514 (1968); *In re* Gault, 387 U.S. 1 (1967); Baxstrom v. Herold, 383 U.S. 107 (1966); Robinson v. California, 370 U.S. 660 (1962); Mackey v. Procunier, 477 F.2d 877 (9th Cir. 1973); Rozecki v. Gaughan, 459 F.2d 6 (1st Cir. 1972); Ashe v. Robinson, 450 F.2d 681 (D.C. Cir. 1971); Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D Wis. 1972); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), 344 F. Supp. 373, and 344 F. Supp. 387 (1972); Kaimowitz v. Michigan Dept. of Mental Health, 42 U.S.L.W. 2063 (Mich. Cir. Ct. 1973).

There are a few articles dealing very effectively with the issues raised, but a definitive work is still to be written. *See, e.g.*, Schreiber, *Indeterminidate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems*, 56 VA. L. REV. 602 (1970); Wexler, *Therapeutic Justice*, 57 MINN. L. REV. 889 (1972); N. Kittrie, *The Right to be Different; Deviance and Enforced Therapy* (1971).

[8] At the time of this writing, there is pending in federal court in Toledo an extensive lawsuit challenging the constitutionality of many of the provisions of the Ascherman Act and the operation of Lima State Hospital for the Criminally Insane, where the Ohio Department of Mental Health and Mental Retardation presently incarcerates most persons committed under the Ascherman Act. *See* Davis, et al. v. Watkins, No. 73-205 (N.D. Ohio 1973).

[9] *See* Oyler v. Boles, 368 U.S. 448 (1962).

[10] *See, e.g.*, Rozecki v. Gaughan, 459 F.2d 6 (1st Cir. 1972); Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971), aff'g 309 F. Supp. 362 (E.D. Ark. 1970); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

freedom of the medical model with the need for restriction of the criminal law model.[11]

I. ANALYSIS OF THE ASCHERMAN ACT

The Ascherman Act, although not particularly long, is complex. Therefore included in Appendix B to this article is a path chart which graphically illustrates the alternatives available at each stage of the Ascherman Act process.

The Ascherman Act has no role to play until after a judgment of conviction for a crime has been entered by a court having criminal jurisdiction.[12] After conviction, any individual is subject to the Ascherman Act for any crime, felony, or misdemeanor, committed in Ohio.[13]

The first stage is a referral for diagnostic evaluation ordinarily to the Department of Mental Health and Mental Retardation to determine whether the individual is either psychopathic, mentally ill, or mentally retarded.[14] Referral is mandatory in sex abuse and child abuse cases.[15] In all other cases of conviction in Ohio courts, referral for examination

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11 Some of the ideas leading to this proposal stem from the author's participation in a series of seminars on the Ascherman Act in 1972 and 1973 sponsored by the Ohio Judicial Conference and the Ohio Department of Mental Health and Mental Retardation, and many of the other participants have unwittingly shared in the development of the proposal, although some clearly would disagree with many of the judgments it makes.

12 In the popular mind, of course, "mental deficiency" is usually equated with insanity as a defense to a criminal charge. In Ohio, as in most places, "mental deficiency" is relevant at several stages of a criminal proceeding, including competency to stand trial, OHIO REV. CODE ANN. § 2945.38 (Page 1954), insanity as a defense, OHIO REV. CODE ANN. § 2945.39 (Page supp. 1972), and "mental deficiency" after conviction (Ascherman Act. Each leads to commitment. The Ascherman Act is the only legal basis for commitment after conviction, although the civil commitment statutes, *see, e.g.*, OHIO REV. CODE ANN. § 5122.01 (Page Supp. 1972); OHIO REV. CODE ANN. § 5125.011 (Page 1970), could serve the same way, and there appears to be a regular practice in Ohio of administrative transfer from penitentiaries to mental hospitals of persons convicted, sentenced and never adjudicated to be "mentally deficient."

For a recognition that the insanity "tests" differ according to which stage the issue comes up, see Fortune v. Reshetylo, 33 Ohio St. 2d 22, 294 N.E.2d 880 (1973).

13 The Act is silent on whether a municipal ordinance violation is the kind of "misdemeanor" which could support an Ascherman Act commitment. There is some analogous authority to support the proposition that it would not, *see, e.g.*, Townsend v. City of Circleville, 78 Ohio St. 122, 136-37 (1908); [1917] OP. ATTY. GEN., vol. 1., p. 953, but no reported authority directly in point.

14 OHIO REV. CODE ANN. § 2947.25 (Page Supp. 1972). An approved psychiatric clinic or three psychiatrists can also make the diagnosis.

15 OHIO REV. CODE ANN. § 2947.25 (Page Supp. 1972), listing offenses by section number. As of January 1, 1974, the effective date of the amendments to the Penal Code in Ohio, there will be a change in the listings caused by a redefining and renumbering of the substantive crimes, which will be contained in new § 2947.25(A). The only serious substantive changes will be the elimination of sodomy as an offense and, therefore, as a basis for mandatory referral, and the removal of incest as a specific offense. Much of the conduct covered by the former offense of incest will be included in a new crime, called "gross sexual imposition," new § 2907.05, which will not be a mandatory referral offense. Soliciting a minor for sex, new § 2907.07 and voyeurism, new § 2907.08, as well as child abuse, new § 2919.22, will be mandatory referral offenses after January 1, 1974.

is discretionary with the court.[16] If there is a report back to the court indicating psychopathy, mental retardation, or mental illness, the court, if it finds the existence of such a condition,[17] has the power to impose an indeterminate commitment on the individual,[18] which, under present practice, will be served in the Lima State Hospital for the Criminally Insane.[19] The commitment continues until such time as the Superintendent of Lima State Hospital decides that the individual has either recovered or has progressed sufficiently so as to make treatment unnecessary.[20] The individual has no right to institute a review to determine whether or not the commitment at Lima is necessary or ought to continue, until after the termination of the maximum sentence for the offense of which he was originally convicted.[21]

For example, one convicted of an offense punishable by 1-20 years imprisonment and then committed under the Ascherman Act may not initiate a judicial or other proceeding, or even a superintendent's review, until twenty years have passed. Thereafter, he may, through an outside person, initiate a judicial proceeding once a year, at which the court may order release if it "finds that such person is not then[22] mentally ill, a mentally retarded offender or a psychopathic offender. . . ."[23] Under the Ascherman Act as it now stands, there is no right to periodic review by an

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[16] The actual standard is "when it has been suggested or appears to the court that such person is mentally ill, or a mentally retarded offender or a psychopathic offender," OHIO REV. CODE ANN. § 2947.25 (Page Supp. 1972).

[17] I have not at this point gone into the hearing procedure to any degree, but it is important to note that, under the law as presently written, the psychiatric report is itself *prima facie* evidence of its conclusions, an apparent violation of the sixth amendment, see note 5 *supra*. In addition, § 2947.25 is silent on the standard of proof required for commitment. There is substantial authority that the fourteenth amendment requires a burden of proof beyond a reasonable doubt on the prosecution. See *In re* Winship, 397 U.S. 358 (1970); Lessard v. Schmidt, 349 F. Supp. 1078, 1095 (E.D. Wis. 1972). At the very best, the equal protection of the laws analysis of Jackson v. Indiana, 406 U.S. 715 (1972) and Humphrey v. Cady, 405 U.S. 504 (1972) would require a preponderance standard on the prosecution.

[18] The court also retains the power to place the offender on probation despite a finding of eligibility for commitment. OHIO REV. CODE ANN. § 2947.25(A) (Page Supp. 1972).

[19] Actually, commitment is to "an appropriate institution designated by the [Division of Forensic Psychiatry of the Department of Mental Health and Mental Retardation.]" OHIO REV. CODE ANN. § 2947.25(B) (Page Supp. 1972).

[20] OHIO REV. CODE ANN. § 2947.27 (Page Supp. 1972). The actual standard for recommending termination of commitment—"Whenever . . . [the person committed] . . . has recovered, or his condition appears to have improved to such an extent that he no longer needs the special custody, care, or treatment of the institution. . . ."—is susceptible of an interpretation which would permit the superintendent to recommend removal from the institution of persons who cannot be "cured"—treatment "failures"—as well as "cures." There is some evidence that this practice has been followed in the past as a method of institutional management.

[21] OHIO REV. CODE ANN. § 2947.27 (Page Supp. 1972).

[22] For authority that the burden ought to be on the state to justify continuation of commitment rather than on the committed individual to prove "sanity," see Waite v. Jacobs, 475 F.2d 392 (D.C. Cir. 1973); Dixon v. Jacobs, 427 F.2d 589, 603 (D.C. Cir. 1970).

[23] OHIO REV. CODE ANN. § 2947.28 (Page Supp. 1972).

independent agency until after the maximum conceivable time for the crime is served.[24]

In the event of a recommendation of termination of the commitment the court *may* terminate the commitment if it "finds that the character of the defendant and his recovery and the circumstances of the case are such that he is not likely again to engage in an offensive course of conduct."[25] The court may also refuse termination, despite the superintendent's recommendation, or grant termination and refuse probation, sending the individual to prison.[26] The most significant point, however, is that the court in most cases does not have the power to order the complete release of the individual, even if the case is an appropriate one for ending the commitment. If the offense is non-probationable, and the maximum term for the offense has not run out, the only alternative available under the Act is to terminate the commitment and start the running of the prison term (with credit given for time served at Lima.)[27] The individual is thus thrown into the prison system and has a right to release only upon the granting of parole by the parole board. Without editorializing too heavily, it seems odd to send a person who has committed a crime to a mental hospital to be cured of his criminality and then place him in prison for punishment after the cure has been effected.

The amendments to the criminal code, effective January 1, 1974, exacerbate the situation because they make non-probationable almost every individual likely to be committed under the Ascherman Act.[28] Specifically,

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[24] The recent penal code revision amends this rule to require annual review of each committed person by the Superintendent and, in the event that in three consecutive annual reviews the Superintendent fails to recommend termination of commitment, a right to have the "Director of Mental Hygiene and Correction" appoint a panel of three physicians from outside the institution to review the Superintendent's determination. New OHIO REV. CODE ANN. § 2947.271(A) and (B) (effective March 23, 1973). Significantly, there is no right to trigger judicial or other extra-departmental review, with the statutory maximum for the offense, unreduced by "good time," remaining, the trigger date.

[25] OHIO REV. CODE ANN. § 2947.27(A) (Page Supp. 1972).

[26] OHIO REV. CODE ANN. § 2947.27(C) (Page Supp. 1972).

[27] Actually, since the only alternative available for non-probationable cases is prison, if the maximum has not been served, the law makes the termination of commitment an administrative, rather than judicial, determination, OHIO REV. CODE ANN. § 2947.27(B) (Page Supp. 1972). While this approach appears logical, since there are *almost* no choices to be made, it ignores the significance of the determination of "non-probationability," which, under the amended penal code, will be significant.

[28] Under present OHIO REV. CODE ANN. § 2951.04 (Page 1954) there are eight specific offenses for which probation is precluded. The offenses are murder, arson, burglary of inhabited dwelling, incest, sodomy, rape without consent, assault with intent to rape, and administering poison. The new penal code changes its focus in determining ineligibility for probation from the offense to the offender and is *apparently* more flexible, New OHIO REV. CODE ANN. § 2951.02(F) (effective March 23, 1973). Probation will be unavailable for persons convicted of "aggravated murder or murder," § 2951.02(F)(1), or for "repeat or dangerous offender[s]," § 2951.02(F)(2), or for offenders who committed their offense "while . . . armed with a firearm or dangerous ordnance. . . ." § 2951.02(F)(3). It seems safe to hazard the view that non-probationability has in fact been expanded in Ohio.

dangerous offenders, repeat offenders, and persons who have committed offenses while using a gun are non-probationable. The definition of a "dangerous offender" includes, without limitation, a psychopathic individual.[29] Thus most of the Lima population is for all intents and purposes non-probationable, as evidenced by the grounds of commitment.

In summary it can be seen that the Ascherman Act is not theoretically consistent. Moreover, after the January 1, 1974 amendments, the legislature will have come very close to enacting a potential life sentence for almost all offenders under a selection process which is verbally vague and has not yet been definitively studied.[30] The way out of confinement, like the way in, is almost standardless.[31]

Not only does the Ascherman Act fail to safeguard procedural rights and the right to release on a fixed date, but it also has no specific provision dealing with the right to treatment, the appropriate methodologies of treatment, and/or the right not to receive treatment. Theoretically the purpose of an Ascherman Act commitment is said to be therapeutic, rather than penal, and admittedly there is some effort going on at the Lima "behavior modification" unit to medically alter propensities toward crime. Nonetheless, the Act itself does not require treatment, as evidenced by the provision permitting the indeterminate sentence to be served at a penal institution if there is no room available in the mental hospital. Nor does the Ascherman Act begin to address itself to the nature of consent, what is appropriate consent, who can properly consent, etc. In effect, the Ascherman Act affords very little to the individual offender.

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[29] New OHIO REV. CODE ANN. § 2951.02(F)(2) (effective January 1, 1974) defines a "dangerous offender" by reference to new § 2929.01, which sets forth criteria for sentencing. It is very inclusive:

> (B) "Dangerous offender" means a person who has committed an offense, whose history, character, and condition reveal a substantial risk that he will be a danger to others, and whose conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences. "*Dangerous offender*" *includes*, without limitation, *psychopathic offender* as defined in Section 2947.24 of the Revised Code. (emphasis added)

Actually, the definition of "repeat offender," contained in § 2929.01(A), is almost as broad and includes any person who has committed a "sex offense," "theft offense" or "offense of violence" (all defined elsewhere in the penal code), including a misdemeanor, and commits another offense in the same category.

[30] Some tentative steps at studying how the intake process functions have been taken by the authors of GORDON, SIMONSEN AND ALLEN, A CASE CLOSEUP: THE "UNRELATED CRIME" AND THE ASCHERMAN ACT, The Ohio State University Program for The Study of Crime and Delinquency (1973).

The claim that the void for vagueness doctrine is applicable to post-conviction commitment statute was raised in Sas v. Maryland, 295 F. Supp. 389 (Md. 1969), which ultimately came to the Supreme Court, as Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972). It was never adjudicated by the Court, however, because the petitioners were released from custody while the case was pending and the writ of certiorari was dismissed. A similar claim is raised respecting the Asherman Act in David, et al. v. Watkins, No. 73-205, (N.D. Ohio 1973).

[31] *See* A. Piperno, Study of Lima Release Criteria. (unpublished at this date).

II. Proposed Amendments

The proposed changes are intended to accord to the individual offender whatever benefits can be obtained in a mental hospital environment with the kind of therapeutic treatment offered there, without denying the individual the substantive rights available in the sentencing process. Thus, there would be established a system in which there are parallel treatment and penal systems existing under coordinate jurisdiction of the Division of Forensic Psychiatry and the Department of Corrections. The content of incarceration will differ in each system, but both will guarantee parallel sentencing rights. In addition, for a very few, special individuals, there would be provided a separate system of commitment via the probate court.[32]

The proposed amendments to the Ascherman Act depend on a total separation of sentencing and commitment power, which is achieved by denying to the common pleas and the municipal courts the power to enter an order of indeterminate commitment of individuals before them. This, of course, marks a drastic change from the Ascherman Act. In the event that an individual is convicted of a crime, comes before a common pleas or municipal court for sentencing, and appears to the judge to be an individual who may be so dangerous, as a result of a mental condition, that he will constitute a continuing danger to society if released without subsequent treatment and modification of his mental condition, the common pleas or municipal court judge will have only one remedy under the Amendment and that is to refer the individual to the probate court. Thus, for municipal or common pleas judges, referral to another court will substitute for the Ascherman Act examination. In effect, the criminal courts will be limited to imposing on guilty individuals the sentence adopted by the legislature for the crime of which they were convicted.

The probate court, upon receiving an individual for an examination from the common pleas or municipal court, will then refer the individual for a psychiatric evaluation to an approved psychiatric facility in that county or region. The court will have the power to commit the individual for a fixed period of time (40 days would appear to be appropriate) for a psychiatric evaluation. The psychiatric clinic which does the evaluation will then, after the period of evaluation is terminated, refer the individual back to the probate court with a report. If the report concludes that there is, in fact, no basis for believing that the individual is a mentally dangerous offender, the probate court will refer the individual back to the common pleas court for sentencing.

If the psychiatric evaluation report indicates that there is reason to

[32] A path chart for the proposal, isolating each of the decisional stages, is attached as Appendix C. It is suggested that the reader follow the proposed amendments on this chart as a means of facilitating understanding of the new structure.

believe that the individual may be a "dangerous person," the probate court will then set a date for a commitment hearing. At the hearing the individual is entitled to be represented by counsel and to be advised of the nature of the report and given the opportunity to defend, cross-examine, etc. This will be the only point in the scheme at which an order of indeterminate commitment may be entered. The standard for commitment at the hearing in the probate court will be that a person, in order to be indefinitely committed as a dangerous person, must be found, beyond a reasonable doubt,[33] to be so dangerous to the physical safety of the community that it is unsafe under present circumstances for such a person to be released without some modification or improvement in the individual's mental and behavior patterns.[34]

If there is no finding that the person before the probate court is a danger to the physical well-being of the community, if released without improvement of his or her mental condition, as with persons who are not evaluated to be dangerous by the psychiatrist, the individual is to be returned to the common pleas or municipal court for imposition of the normal sentence. If the court finds beyond a reasonable doubt the facts necessary for indefinite commitment, the probate court judge will enter an order of commitment to a mental hospital (most likely Lima) under the supervision of the Department of Forensic Psychiatry.

In the event that an individual is subject to indeterminate commitment, the entry of the order of indeterminate commitment has as an automatic consequence the elimination of the penal sentence in the common pleas or municipal court. Thus the entry of the probate court's order constitutes a total expungement of the judgment of conviction, the underlying charge, and any obligation of the individual committed to serve a sentence. As with the elimination of common pleas and municipal court commitment power, this provision is a major departure from the present Ascherman Act and is one of the keys to the functioning of this system. It is my belief that the structure of the Ascherman Act, placing commitment in

[33] At this stage, the only basis for the commitment is predictive. That being so, the reasonable doubt standard seems more, rather than less, imperative than in a criminal trial. *See* Lessard v. Schmidt, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972). *See also* Murel v. Baltimore City Criminal Court, 407 U.S. 355, 358 (1972) (opinion of Douglas, J., dissenting from dismissal of writ of certiorari.)

[34] As can be seen, the standard proposed is predictive, rather than an incorporation of an existing medical category, such as psychopath. This can be criticized on the ground that psychiatrists ordinarily can not safely predict future behavior and, therefore, that they will be unable to meet the standard. The answer to this criticism is that the *sole* justification for indeterminate commitment offered in this scheme is that certain persons will be a specific danger to the community in the future unless committed. If, as to any person, future dangerousness cannot be conclusively predicted, he should not be committed, but should be sentenced. The use of medical definitions, such as sociopath, are of interest in this scheme only insofar as they tell us something about predicted future behavior, because, since we are only incidentally concerned with medically benefitting the individual, it is only the prediction we care about. It seems better to frame the test in terms of the legislative purpose, rather than to obscure it.

the hands of the sentencing judge, but not requiring the sentencing judge to make any decisions which are "costly" to the court or the system, results in a system or over-commitment of individuals, primarily because commitment is easy and "low cost." Under the probate court scheme the separation and the "cost," the total elimination of the penal sentence, should act as a signal to the probate court to commit only those individuals who truly represent a serious danger to the community as a result of a mental condition. Presumably the bulk of convicted individuals would remain in the sentencing process, thus protecting for them the release rights afforded by that process. The "cost" will be apparent below when the provisions for termination of commitment are discussed.

Obviously, this scheme has as a concomitant benefit the elimination of those provisions of the Ascherman Act which result in persons leaving the mental hospital and going into a prison. A practical problem which is thereby avoided is the difficulty of transition from the hospital to the prison atmosphere. The mental hospital, under present circumstances, is not a violent milieu. Prison usually is and frequently presents a physical threat to persons coming in from the mental hospital environment. This scheme would effect a change in that situation.

As is presently the case, the mental hospital would be run by the Department of Forensic Psychiatry under a superintendent, but the hospital would be governed by an advisory board, modeled on Section four of the Maryland statute establishing the Patuxent Institute.[35] The advisory board would be composed of certain persons in the community who hold positions which establish their expertise in this area. The individuals would include the professor of psychiatry at several university medical schools, the professor of constitutional or criminal law at several university law schools in the state and others. The advisory board will have three basic powers. The first is the absolute power to forbid certain modes of treatment.[36] The advisory board will also have the power to define and recom-

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[35] MD. ANN. CODE, art. 31B, § 4 (Supp. 1970).

[36] The fact that behavior modification programs will be offered at the institution raises some fundamental questions. Assuming behavior modification by the state in an institution is not in itself unconstitutional, and putting aside for the moment the question of what, if anything, is a proper consent to behavior modification in an institution, certainly some forms of behavior modification are improper and, possibly, unconstitutional. *Cf.* Furman v. Georgia, 408 U.S. 238, 314 and esp. 329-33 (1972) (concurring opinion of Marshall, J.). *See also* Mackey v. Procunier, 477 F.2d 877 (9th Cir. 1973).

Assuming behavior modification is to be utilized, it appears likely that what is permissible in any one place will be dependent on the state of the art nationally and the extent to which the mode of treatment offered is predominantly conventional, rather than experimental. *See, e.g.*, Kaimowitz v. Michigan Dept. of Mental Health, 42 U.S.L.W. 2063 (Mich. Cir. Ct. 1973). In view of the increase in investigation of causes of psychopathy, *see, e.g.*, Goldman, *Sociopathy and Diseases of Aronsal*, QUADERNI DI CRIMINOLOGICA CLINICA (1972), and of experimentation with modes of treatment ranging from psychosurgery to aversive therapy, the standard for propriety will likely be a changing one. A legislative standard, at this stage, will either provide no restraints or, if effective, have a lock-in effect. Thus, it is proposed that a board of experts may be the most effective way to defer legislative determination

mend particular modes of treatment as well as the quality of institutional care, such recommendations to be made to the Director of Forensic Psychiatry, presumably to be transmitted to the legislature.[37] Finally the advisory board will have the power to determine appropriate methods for obtaining consent from individuals whom the superintendent may propose to subject to various forms of behavior modification.[38] Thus the creation

of permissibility. The Maryland Act, on which this proposal is modeled, seems to limit its concern to lobotomies, but changing technology seems to warrant expanding the advisory board concept to all aspects of behavior modification.

A subsidiary question, rarely faced, of what is permissible use of drugs or other intrusive interferences with personality or consciousness as a means of maintaining discipline or order in the institution, will likewise fall under the final jurisdiction of the advisory board.

[37] In some contexts, a constitutional or statutory "right to treatment" has been declared, *see, e.g.*, Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971). There does not, however, appear to be any direct constitutional source for such a "right." In the context of post-conviction commitment, the issue of "treatment" usually comes up as the state's rebuttal to the inmate's claim that the incarceration fails to comply with due process of law, *see, e.g.*, Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971). Treatment is thus not a "right" in itself, but rather offered as an alternative to traditional criminal rights, an analysis which usually ignores the normal rule that the beneficiary of the "right" is the proper person to determine whether it should be asserted, *see* Fay v. Noia, 372 U.S. 391 (1963). An additional problem is that we usually think of "treatment" as the effort to terminate a deteriorating condition, *e.g.*, antibiotics for pneumonia, or to stabilize or correct an abnormal state, *e.g.*, setting a broken leg. Behavior modification through surgery, drugs or therapies aimed at changing the brain, nerves or other aspects of the body affecting behavior does not quite fit the model, especially if the patient would not be particularly interested in receiving treatment if he or she were not incarcerated.

It seems preferable to have an advisory board decide what "treatments" should be offered, rather than declare an abstract right to treatment, especially since serious consideration must be given to whether there is a right to resist treatment.

[38] The issue of what is proper consent is extremely difficult. The normal rules of constitutional law would require consent to be knowing and voluntary and would, in effect, require the inmate to be informed that he has a right to refuse treatment in order for his waiver to be of any value. Fay v. Noia, 372 U.S. 391 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938). Such an approach, of course, assumes recognition of a right to resist treatment, without which the question of consent or waiver becomes largely irrelevant. Parenthetically, it should be noted that the Supreme Court may be in the process of redefining the constitutional concept of consent to something more akin to acquiescence in some contexts. *Compare* Schneckloth v. Bustamonte, 93 S. Ct. 2041 (1973) *with* Bumper v. North Carolina, 391 U.S. 543 (1968). Assuming the *Fay v. Noia* standard, requiring intentional relinquishment of a known right, governs, there remains the problem of whether a person who has been adjudicated to have a mental condition justifying commitment has the capacity to waive a fundamental right. There are no easy answers to how much is enough intellectual capacity or, if the inmate lacks it, who is the appropriate person to act in his or her place in deciding to consent to a mode of treatment which could be resisted.

Finally, assuming capacity, there is serious reason to doubt whether the *Fay v. Noia* standard could ever be satisfied when the body seeking the consent also controls the keys to the jail. Under such circumstances it is likely that release is either directly contingent on cooperation with treatment or is contingent, less directly, on a change of the inmate's mental state, and the only possibility for change to occur is acquiescence in the treatment offered. In the face of an active, treatment-oriented administration, the inmate will be hard-put to resist. *Cf.* Kaimowitz v. Michigan Dept. of Mental Health, 42 U.S.L.W. 2063 (Mich. Cir. Ct. 1973).

Finally, moving from the area of constitutional law to the law of torts, it is likely that a very large amount of information, possibly an amount which would make the treatment highly unattractive, will have to be conveyed in order to immunize the hospital from tort liability, *see, e.g.*, Gray v. Grunnagle, 423 Pa. 144, 223 A.2d 663 (1966); Bowers v. Talmage, 159 So. 2d 888 (Fla. Ct. App. 1964). *See generally* Kloss, *Consent to Medical Treatment*, 5 MEDICINE, SCIENCE AND LAW 89 (1965). *But cf.* Natanson v. Kline, 350 P.2d 1093 (Kan. 1960).

of an advisory board is an effort to cope with the conflicts created by the developing concept that the indeterminately committed individual has a right to treatment. Hopefully such a board would make decisions on a regular basis, rather than in sweeping terms as a legislature must, or in the slow and cumbersome fashion which frequently characterizes litigation.

For the advisory board to function effectively it will be crucial that it be manned by individuals possessing specific technical and clinical expertise. It would be disastrous to place on the board typical political appointees, who have community standing, but no technical expertise. The advisory board will serve as an adviser to the Department of Forensic Psychiatry, which also has the responsibility for running the mental hospital. It will not serve as a release agency.

The release agency will be a separate agency called the "Institutional Board of Review," which is likewise modeled upon the Maryland statute. Individuals incarcerated pursuant to an indeterminate commitment order will be accorded the right to periodic review by the Institutional Board of Review. The Institutional Board of Review will be required to determine whether or not the conditions and status of the individual which led to the entry of the commitment order continue to exist. The burden of proof as to that issue will be on the board to justify commitment. The individual will be entitled to come before the board for such a reevaluation on an annual basis. If the board determines the individual has changed sufficiently so that he no longer poses a serious threat of physical violence to society, the board may order release. If the board does not order release, the individual may appeal to the probate court, which will then have the power to affirm or reverse the decision of the Institutional Board of Review (this latter will be an adversary decision), and which may likewise enter an order terminating the indefinite commitment. Thus, there is a self-enclosed system with the probate court as the only entry and with the Institutional Board of Review and the probate court as the two avenues of egress.

It is important to note that this probate court scheme will serve as a model for other forms of commitment of individuals fitting in the interstices of the criminal and commitment systems. Specifically, in addition to Ascherman Act cases, other individuals committed under present law include persons found incompetent to stand trial, persons acquitted on the ground of insanity, and persons in the penal system determined by the prison administration to be in need of the facilities of a mental hospital.

The developing constitutional law is that the involuntary indeterminate commitment system is the baseline and that an individual must be subjected to a process at least as protected as the indeterminate commitment

One approach to dealing with these questions is to have an advisory board, aware of the problems, establish standards.

process when exposed to commitment in one of these other situations.[39] Thus, the probate court commitment scheme, with its procedural safeguards, will ultimately serve as the model for commitment of incompetent persons, persons acquitted on the ground of insanity, and persons in the prison system whom prison personnel believe to be in need of indeterminate commitment as a result of a mental condition.[40]

On the other hand, those individuals who are returned to the common pleas or municipal court because they were not found beyond a reasonable doubt to be the kind of dangerous person requiring commitment will be subjected to the normal criminal process. Initially the common pleas or municipal court judge will have to decide whether to impose a prison sentence or grant probation, in which determination he or she can, of course, consider the psychiatric evaluation given by the probate court psychiatric evaluation team.

Those individuals upon whom a prison sentence is imposed will go to an intake evaluation center similar to the intake evaluation center presently run by the Department of Corrections. The one distinction will be that where the present system is staffed by corrections people who have as their primary function determining what the custody/security "needs" of the individual are, under the new system there will be a second team at the intake evaluation center, under the supervision of the Division of Forensic Psychiatry, who will have as their primary function determining whether or not an individual has a mental condition such that he or she will benefit from a therapeutic milieu. If the intake evaluation group finds that an individual ought to be subjected to a therapeutic rather than a penal milieu because of potential benefits, the individual will then serve his or her penal sentence in the mental hospital, rather than in a prison. The mental hospital presumably will be run by the Division of Forensic Psychiatry and will be subjected to supervision by the same advisory board mentioned previously.[41]

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[39] See cases cited in note 7 *supra* and especially Jackson v. Indiana, 406 U.S. 715 (1972).

[40] While I have not discussed the issue at any length here, it is my view that the "baseline" commitment scheme is civil commitment consistent with the Constitution, not as it exists in the statute. In this regard, the Ohio scheme contained in OHIO REV. CODE ANN. ch. 5122 (Page 1970) seems to be woefully unconstitutional both in its method of intake, *see* Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972); and in its method of deciding when commitment terminates, *see* Jackson v. Indiana, 406 U.S. 715 (1972).

The present and proposed commitment schemes can be most easily compared by placing the relevant portions of the appendices side-by-side.

[41] In effect, there will be two "routes" through the corrections system, one penal and one "therapeutic," with the choice to be made by intake evaluators. Obviously, the choice is significant because of the great differences between the two routes. Accordingly, unless the intake evaluators have the capability, time, and facilities to function effectively, the system will be open to the charge that it is arbitrarily and irrationally discriminating.

I have purposely provided that the route, once chosen, must be adhered to, despite the possibility that persons may go into a therapeutic milieu and, after a time, have full benefit or prove amenable to no benefit. They could thus clog the system. There are several answers. First, the "full benefit" people will be good candidates for parole and, since parole eligibility

The individual will have a right to release by an Institutional Board of Review, which could be the same Institutional Board of Review discussed earlier. This board will administer a body of aw identical in all respects to the body of law administered by the parole board for persons who have gone into prison. All persons released before the maximum term will become parolees. Parole will remain under the Department of Corrections. As can be seen, the purpose of this system is ultimately to afford the possibility of a therapeutic experience to individuals, but maintain a parallel system of rights for those individuals. They will thus have the same right to review for release after passage of their minimum sentence minus any credited time as persons in the prison system are accorded by the parole board. They will have the same procedural rights available at the parole baord and will have the same eligibility for release and the same absolute right to release after the passage of the maximum term. Thus there are no substantive rights lost by serving a prison term in a mental hospital. The mental hospital prisoner will not in effect be a committed individual.[42]

While I believe that this scheme is consistent with the Constitution, it bears repeating that the "therapeutic" side of the intake evaluation center has an enormous amount of power because the content of imprisonment will be different on both sides. Therefore, the quality, nature, and constitutionality of the scheme depends upon a high quality intake evaluation

will generally be coming much sooner after January 1, 1974, will not clog the system for long. Second, the people who are not amenable to treatment will constitute a source of pressure on the intake evaluators—one of the "costs" which will make them be very cautious in deciding who can benefit from a therapeutic milieu.

Finally, having observed the Ascherman Act in operation and having spoken to numerous inmates, it has become apparent to me that, when prison administrators can send prisoners to a mental hospital and mental hospital administrators can send inmates to prison, each system becomes the other's "club," the threat which administrators can use to keep inmates under control. The grass is almost always thought to be less green in the other institutions. As a result, I have puposely avoided permitting a cross-over from the parallel corrections systems. Persons assigned to a therapeutic milieu will not cross-over to prison when they cease to benefit. Prisoners will not cross-over to the mental hospital.

[42] One criticism of this scheme is that there may be persons who were not committed by the probate court who will become eligible for release and who will be known to the personnel of the mental hospital to be dangerous if at large. It can be argued, for example, that a more accurate prediction of whether an individual is very likely to engage in future conduct dangerous to the physical well-being of others can be obtained after a lengthy observation in prison or a mental hospital rather than at the time of adjudication. There are, of course, grounds to refute this point of view, *see, e.g.*, Kozol, Boucher and Garofolo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME AND DELINQUENCY 371 (1972), and it is well known that prison or institution performance coincides very little with performance in the "free world." In addition, maximum sentences for most crimes remain long in Ohio, and there is little reason to believe that the parole board or the institutional board of review will act favorably toward somebody whom prison or mental hospital administrators believe is a serious danger to society.

The primary reason for avoiding commitment after service of sentence is that, at that stage, there would be no "cost" involved to the court. Everywhere else in the proposal, decision-makers have to weigh against an order of commitment or therapeutic treatment the loss of some other benefit to society, *e.g.*, the prison sentence. At this stage, there is nothing to weigh against commitment except the interests of the individual charged.

process. Its efficiency and effectiveness also, of course, will depend upon an increase in the amount of money and improvement of the quality of the system run by the Division of Forensic Psychiatry. A further caveat ought to be added. This proposal contains a rather rigid separation of the legal concepts involved in sentencing and commitment, but permits integration of medical and related facilities. Any reintegration of the legal systems would reintroduce the saame problems which exist now in the Ascherman Act.

Appendix A

JUDGMENT AND SENTENCE—MENTALLY DEFICIENT AND PSYCHOPATHIC OFFENDERS

2947.24 Definitions.

Sections 2947.24 to 2947.29, inclusive, of the Revised Code shall be administered by the criminal courts in dealing with mentally retarded offenders and psychopathic offenders in cases in which the court finds that the imposition or continued enforcement of the applicable penal sentence will not afford to the public proper protection against possible future criminal conduct of such mentally retarded or psychopathic offenders.

As used in such sections:

(A) "Mentally retarded offender" means any person who is adjudged mentally retarded, as defined in section 5125.011 of the Revised Code, who exhibits criminal tendencies and who, by reason thereof, is a menace to the public.

(B) "Psychopathic offender" means any person who is adjudged to have a psychopathic personality, who exhibits criminal tendencies, and who by reason thereof is a menace to the public. Psychopathic personality is evidenced by such traits or characteristics inconsistent with the age of such person, as emotional immaturity and instability, impulsive, irresponsive, reckless, and unruly acts, excessively self-centered attitudes, deficient powers of self-discipline, lack of normal capacity to learn from experience, marked deficiency of moral sense or control.

(C) "Indefinite commitment" means commitment to the department of mental health and mental retardation, subject to termination only by an order of release in the manner prescribed in sections 2947.24 to 2947.29, inclusive, of the Revised Code.

(D) "Court" means any court of record in which a mentally retarded offender or psychopathic offender was convicted of the crime for which he is awaiting sentence or has been sentenced.

(E) "Psychiatric examiner" or "psychiatrist" means a person licensed to practice medicine in this state, whose training and experience includes a minimum of five years in the treatment of mental diseases.

(F) "Psychologist" means a person who has been graduated with the degree of doctor of science or of philosophy, in psychology from a graduate school of a university on the approved list of the association of American universities, and whose training and experience includes a minimum of two years' practice in clinical psychology after obtaining either of the above degrees.

So far as is practicable, without undue interference with the orderly conduct of the business of the court, all hearings and other proceedings relating to any mentally retarded or psychopathic offenders shall be had before the judge who presided at the trial resulting in the conviction upon which such offender is dealt with under sections 2947.24 to 2947.29, inclusive, of the Revised Code, if such judge is still a judge of the court having jurisdiction.

(1972 H 494, eff. 7-12-72. 1969 H 688; 130 v H 430; 125 v 823)

2947.25 Psychiatric examination before sentence; hearing on report of examination.

After conviction and before sentence, a trial court shall refer for examination all persons convicted under section 2903.01, 2905.01, 2905.02, 2905.03, 2905.04,

2905.07, or 2905.44 of the Revised Code, and all persons convicted of abusing, beating, torturing, starving, or otherwise causing physical injury to a child to the department of mental health and mental retardation or to a state facility designated by the department, or to a psychiatric clinic approved by the department, or to three psychiatrists. Prior to sentence the court may refer for such examination any person who has been convicted of any felony except murder in the first degree where mercy has not been recommended, or any misdemeanor when it has been suggested or appears to the court that such person is mentally ill, or a mentally retarded offender or a psychopathic offender. Reference to the department, clinic, or psychiatrists shall be for a period of not more than sixty days.

The department, clinic, or psychiatrists shall make a careful examination of such person and furnish to the court a report in writing of the finding as to the mental condition of the person at the time of examination, together with such recommendations, suggestions, and opinions as may be helpful to the court, which report shall also contain the names and addresses of the parties making the examination. Such report is a public record and becomes a part of the files in the case but shall not be spread at large upon the journal. A certified copy of such report shall be served upon such person's attorney of record within three days after the filing thereof with the court, and shall be furnished to such person on his written request. If any psychiatric examiner or psychologist not on the staff of any such psychiatric clinic or the department or a state facility designated by the department is so appointed, the cost thereby incurred shall be determined by the court and allowed and taxed as costs and paid in the same manner as witness fees in criminal cases.

The court shall conduct a hearing thereon not earlier than ten nor later than thirty days after the service of such copies of the report. Both the state and such person, his guardian, or next friend may appear in person or by counsel at such hearing, subpoena, examine, and cross-examine the examiners making the report, regardless of the part of the state in which the examiners may live, and produce witnesses, both lay and expert, as to the mental condition of such person. In the event and to the extent that no subpoenas are issued for the examiners to appear at the hearing, the report or such part of it as was prepared by the examiners for whom no subpoena was issued is prima-facie evidence.

If upon consideration of such report and such other evidence as is submitted, the court finds that such person is mentally ill as defined in section 5122.01 of the Revised Code and is subject to hospitalization as provided in section 5122.15 of the Revised Code or is a mentally retarded offender or a psychopathic offender as defined in section 2947.24 of the Revised Code, the court shall enter such finding on the records and shall either:

(A) Place the defendant on probation under sections 2951.02 to 2951.12, inclusive, of the Revised Code;

(B) Impose the appropriate sentence for the offense of which the person was convicted. At the same time the court shall enter an order of indefinite commitment of such person to the department of mental health and mental retardation, during the continuance of which the execution of sentence shall be suspended. Thereupon such person shall be sent to an appropriate institution designated by the department. If the department, because of lack of facilities, fails to designate an appropriate institution, such person shall be sent to the penal institution to which he would have been sentenced had he not been adjudged mentally ill, a mentally retarded offender, or a psychopathic offender. Such orders of indefinite commitment shall show the offense of which such person was convicted and the

minimum and maximum penalties therefor. Certified copies of said order and the reports of the examiners, unless submitted by the department, shall be sent to the department. Every order of indefinite commitment is a final order.

Motions for a new trial, bail, and appeal on questions of law are applicable to such cases.

Any finding under sections 2947.24 to 2947.29, inclusive, of the Revised Code, that a person is mentally ill, a mentally retarded offender, or a psychopathic offender, is a final order.

This section shall not apply to teachers punishing children in accordance with school policy regarding such punishment.

If upon consideration of the report and such other evidence as is submitted, the court finds that a person convicted under section 2903.01, 2905.01, 2905.02, 2905.03, 2905.04, 2905.07, or 2905.44 of the Revised Code or a person convicted of abusing, beating, torturing, starving, or otherwise causing physical injury to a child and who has the care and custody of a child or children is, by reason of mental condition, unfit, unable, or incapable of properly and adequately caring for children, the court shall order the child or children removed from the care and custody of the person found unfit and placed as authorized for the placement of dependent children under jurisdiction of the court.

(1972 H 494, eff. 7-12-72. 1969 H 688; 132 v S 316; 129 v 1448; 126 v 392; 125 v 823)

2947.26 Postponement of commitment; release.

The court in which any person convicted of a misdemeanor is adjudged a mentally retarded or psychopathic offender may postpone indefinitely the commitment of the person under such terms as the court deems suitable. At any time during the period of the postponement of commitment if it appears to the court that the person is no longer likely to be a menace to the welfare and safety of the community, the court may adjudge the person no longer a mentally retarded or psychopathic offender and order his release from the provisions of sections 2947.24 to 2947.29, inclusive, of the Revised Code.

(1969 H 688. Eff. 11-21-69)

2947.27 Recovery or improvement of inmate.

Whenever a person committed under section 2947.25 of the Revised Code has recovered, or his condition appears to have improved to such an extent that he no longer needs the special custody, care, or treatment of the institution to which he was committed, the superintendent of the institution shall report the facts to the coordinator of forensic psychiatry in writing, who may order further examination and report of such person. Except for those persons disqualified for probation under section 2951.04 of the Revised Code, when such person has recovered or is sufficiently improved to justify such action, the coordinator shall certify said report or reports and its findings and recommendations to the court which tried such person, and such court shall thereupon hold a hearing on such matter not earlier than ten days nor later than thirty days after the delivery of such report to the court to determine the proper disposition of the person commited under section 2947.25 of the Revised Code. Both the state and such person, his guardian or next friend, may appear in person or by counsel at such hearing and each party shall have the right to subpoena, examine, or cross-examine witnesses. After reviewing the findings and recommendations of the coordinator and

the reports of the superintendent, and after considering the evidence offered at the hearing and any written report of investigation made by a probation officer in accordance with section 2951.03 of the Revised Code, the court shall issue one of the following orders:

(A) Except for those persons disqualified for probation under section 2951.04 of the Revised Code, where the court finds that the character of the defendant and his recovery and the circumstances of the case are such that he is not likely again to engage in an offensive course of conduct and that the public good does not demand or require that the original sentence be carried out, the judge may suspend the further execution of the sentence and place the defendant on probation in accordance with the provisions of sections 2951.02 to 2951.12, inclusive, of the Revised Code.

(B) If such person is disqualified for probation under section 2951.04 of the Revised Code and has recovered or is sufficiently improved to justify such action, as certified by the coordinator in his report and findings, the coordinator shall issue an order terminating the person's indefinite commitment. The sentence which was suspended under section 2947.25 of the Revised Code shall forthwith go into effect and the person shall be transferred to the appropriate penal or reformatory institution, together with a certification of the report and findings to the superintendent thereof, after which he is subject to the jurisdiction of the court or the adult parole authority. For the purposes of reckoning the eligibility of such person for parole or discharge, the time of confinement under an order of indefinite commitment in accordance with section 2947.25 of the Revised Code shall be counted as time served with good behavior under the applicable sentence.

(C) Where a person has had the hearing required by this section, been denied probation by the trial court, and been confined for a period less than the maximum sentence for the offense of which he was convicted, the trial court shall terminate the indefinite commitment. The sentence which was suspended under such section shall forthwith go into effect and the person shall be transferred to the appropriate penal or reformatory institution, after which he is subject to the jurisdiction of the court or the adult parole authority. For the purposes of reckoning the eligibility of such person for parole or discharge, the time of confinement under an order of indefinite commitment in accordance with such section, shall be counted as time served with good behavior under the applicable sentence.

If such person has been confined for a period equaling or exceeding the maximum sentence for the offense of which he was convicted, the order shall provide that the person be placed on trial visit under supervision. If, after a suitable period of supervision on trial visit, the director of mental health and mental retardation is satisfied that the person no longer requires supervision, the indefinite commitment and the sentence suspended under such section shall be terminated and the person shall be discharged from the legal control and custody of the department.

(1972 H 494, eff. 7-12-72. 1970 S 272; 132 v S 316, H 1; 125 v 823)

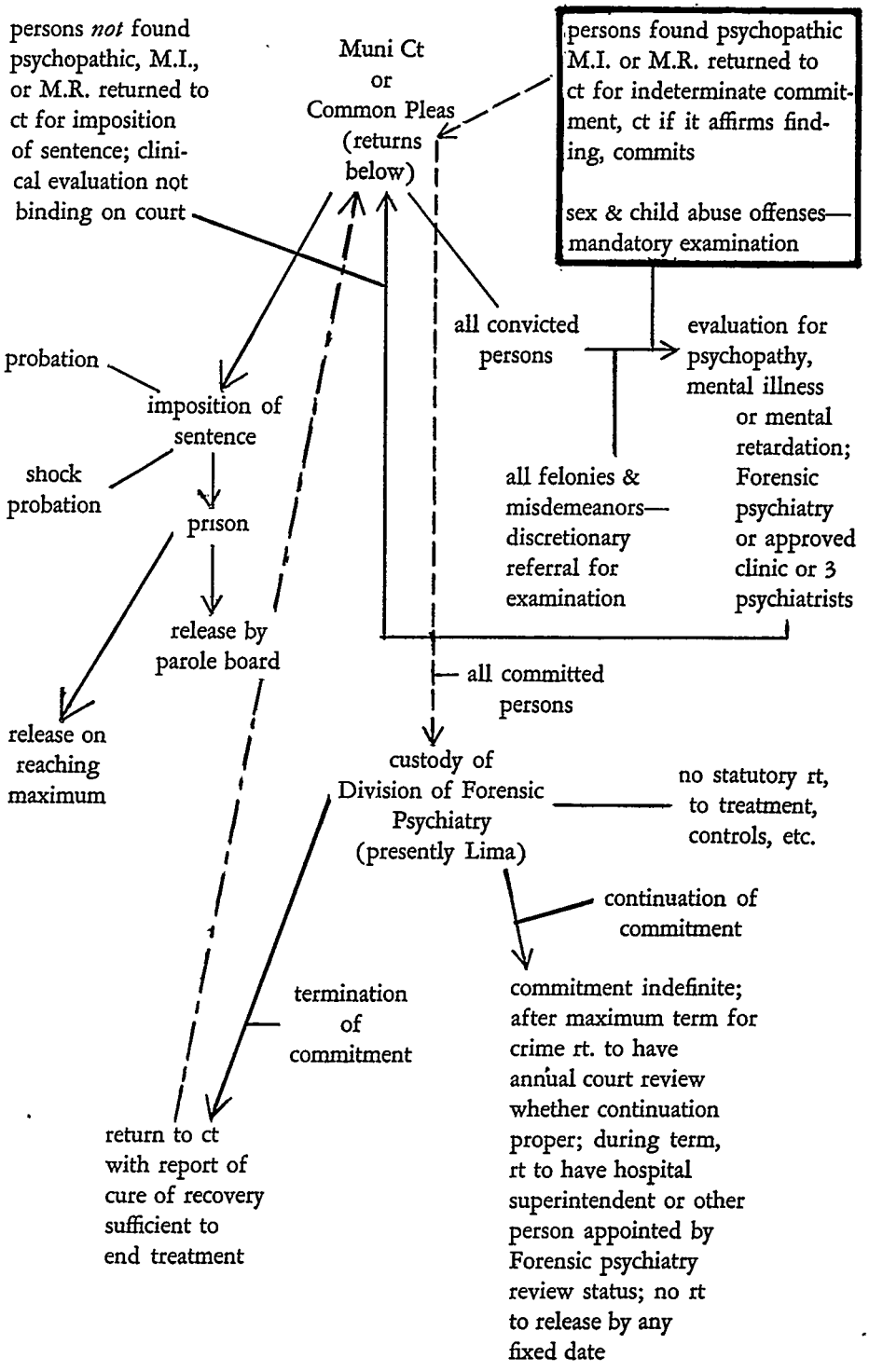
2947.28 Application for release.

At any time after the expiration of a period equivalent to the maximum sentence for the offense of which he was convicted and sentence suspended, any person committed under section 2947.25 of the Revised Code may make application personally, by counsel, or by guardian or next friend, for his release to the court by which he was committed. The court shall grant a hearing upon such application, at which hearing it shall give consideration to reports and recommendations of

the department of mental health and mental retardation and to such evidence as the applicant may present. No subsequent application may be heard on behalf of any person whose application is denied, except by leave of court, within one year after the date of the last preceding hearing. If, upon any hearing provided by this section, the court finds that such person is not then mentally ill, a mentally retarded offender, or a psychopathic offender, the court shall order the department to discharge such person and the sentence suspended under such section shall be terminated.

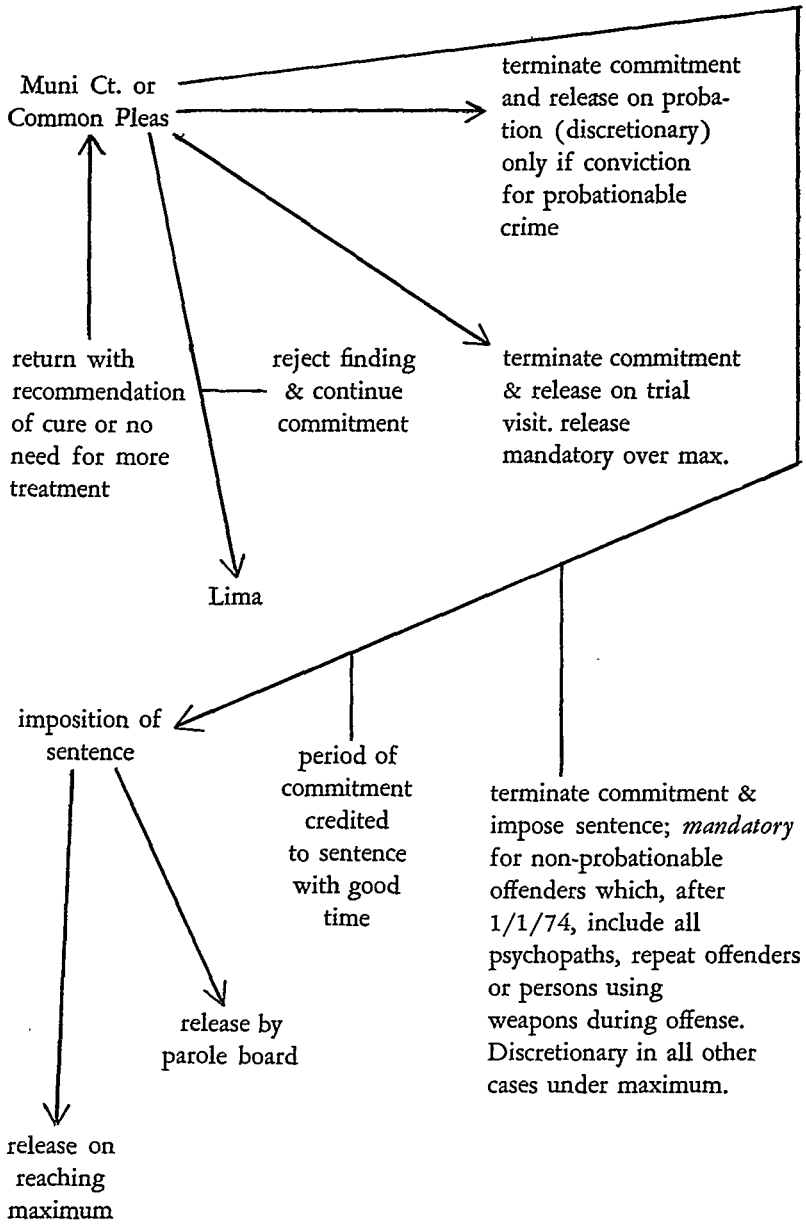
(1972 H 494, eff. 7-12-72. 1969 H 688; 125 v 823)

Appendix B
FLOW CHART OF ASCHERMAN ACT

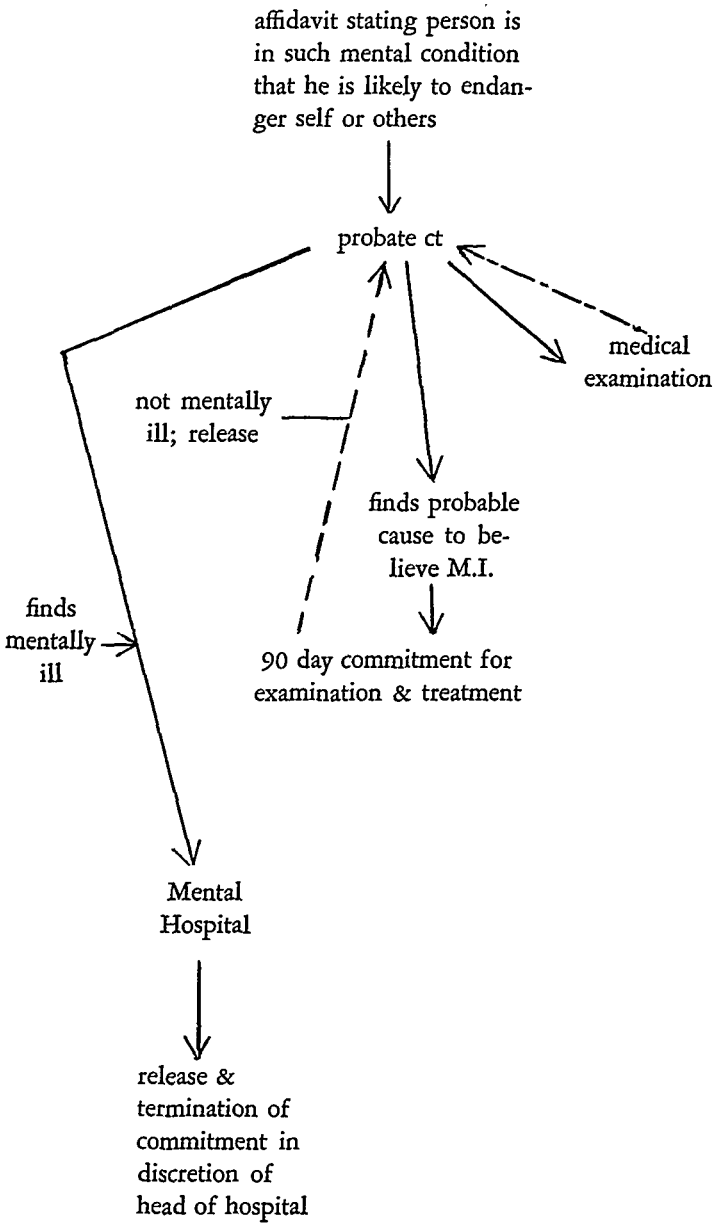


(from above)

SEPARATE ILLUSTRATION OF CHOICES ON RETURN FROM LIMA

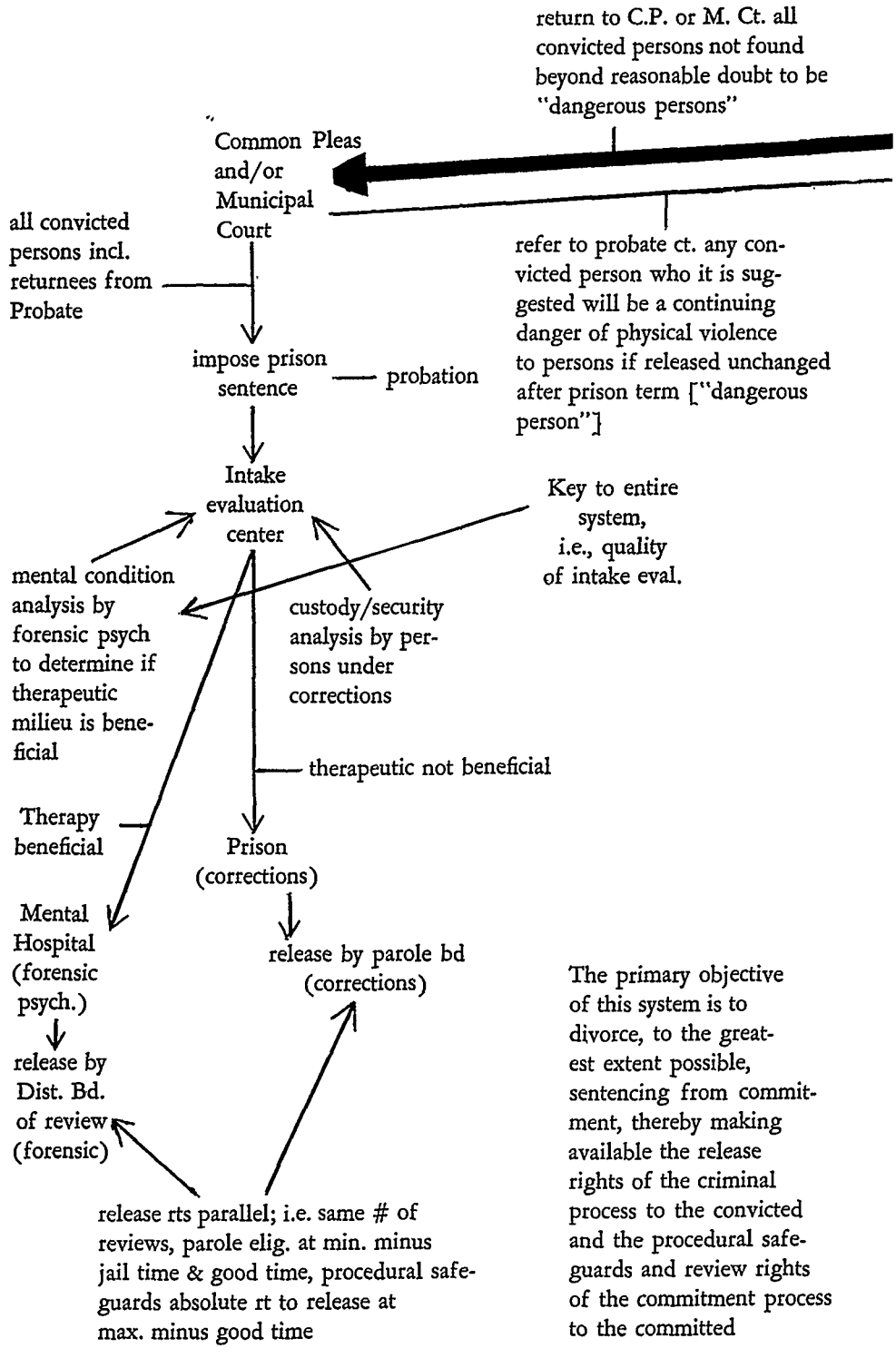


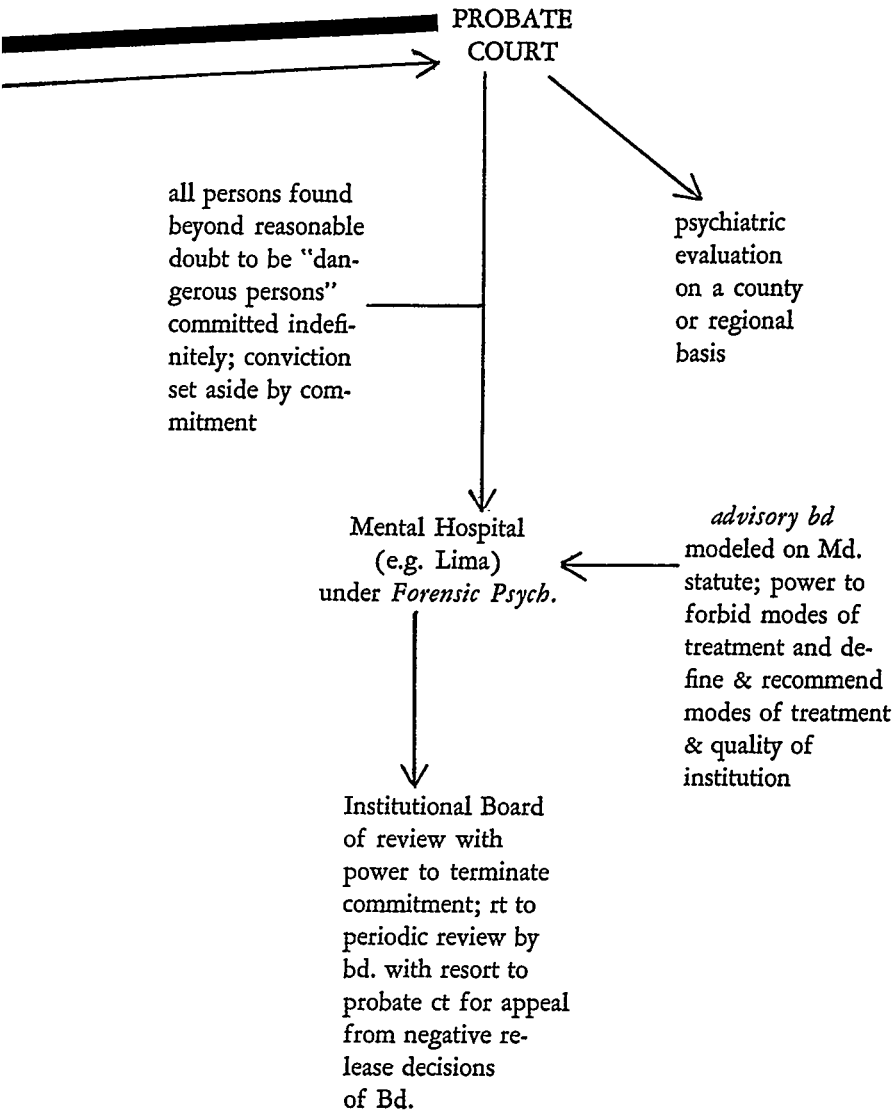
PRESENT CIVIL COMMITMENT



Appendix C

FLOW CHART OF PROPOSED AMENDMENT OF THE ASCHERMAN ACT




PROBATE COURT
all persons found beyond reasonable doubt to be "dangerous persons" committed indefinitely; conviction set aside by commitment
psychiatric evaluation on a county or regional basis
Mental Hospital (e.g. Lima) under *Forensic Psych.*
advisory bd modeled on Md. statute; power to forbid modes of treatment and define & recommend modes of treatment & quality of institution
Institutional Board of review with power to terminate commitment; rt to periodic review by bd. with resort to probate ct for appeal from negative release decisions of Bd.